No. 83-96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

THE HOOVEN & ALLISON COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. THIS COURT'S DECISION IN *MICHELIN* RENDERS INAPPLICABLE THE DOCTRINE OF COLLATERAL ESTOPPEL BASED ON *HOOVEN I*.

Respondent has misstated both the Tax Commissioner's argument and the holding of this Court in *Commissioner v. Sunnen*, 333 U.S. 591 (1948). Respondent initially states

that the Tax Commissioner argued only that *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) overruled *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (*Hooven I*) as a matter of law. Brief for Respondent, at 10.

This statement is inaccurate in two ways. First, the Tax Commissioner's initial contention is that because *Michelin* repudiated the "original package" doctrine it overruled in principle all of the cases which were based upon that doctrine and that *Hooven I* was one of those cases. Second, this is not the Tax Commissioner's only contention, as respondent recognizes by its attack on the Tax Commissioner's reliance on *Commisioner v. Sunnen*. As a review of the Tax Commissioner's second argument in her Brief for the Petitioner clearly reveals, the Tax Commissioner has contended that even if *Michelin* is not viewed as overruling *Hooven I* in principle it did effect a change in the controlling legal principle upon which *Hooven I* was based and under the limitations enunciated in *Sunnen* the Ohio Supreme Court improperly applied collateral estoppel based upon *Hooven I* to the assessment at issue.

Respondent also misstates the Tax Commissioner's argument regarding the limitation on the doctrine of collateral estoppel. Respondent states that "the Tax Commissioner has contended, that every change in the legal atmosphere surrounding a prior decision of this Court empowers an inferior tribunal to ignore the collateral estoppel effect of that decision." Brief for Respondent, at 11. That is not the Tax Commissioner's contention. The Tax Commissioner's argument is that collateral estoppel is inapplicable where an intervening decision of this Court *(Michelin)* has changed the controlling legal principles upon which the prior decision *(Hooven I)* was based.

This argument is based upon this Court's decision in *Sunnen*. Respondent argues that the Tax Commissioner

has read *Sunnen* much too broadly. The invalidity of this argument is demonstrated by the fact that the Tax Commissioner used the exact words of *Sunnen* in stating her argument:

> But a subsequent modification of the significant facts or a *change or development in the controlling legal principles* may make that determination obsolete or erroneous, at least for future purposes. (emphasis added) 333 U.S., at 599.

It is noteworthy that this is the very portion of *Sunnen* cited to by respondent in support of its statement that "[t]he decision in *Sunnen* stands for the accepted proposition that collateral estoppel does not operate in the event of a major change in the controlling facts or a reversal in the applicable legal principles. *Id.* [Sunnen] at 599." Brief for Respondent, at 11. Respondent repeats this inaccurate and misleading statement throughout its argument, stating that collateral estoppel applies unless the prior decision has been reversed or overruled. As the above-quoted language of *Sunnen* clearly establishes, this is not the holding of that case. At no point in *Sunnen* is it even suggested that the application of collateral estoppel is restricted only where the controlling legal principles have been reversed or overruled. Rather, the decision expressly holds that the doctrine is inapplicable where there has been a "change in the legal atmosphere" or a "modification or growth in legal principles as enunciated in intervening decisions of this Court." 333 U.S., at 600.

Moreover, contrary to respondent's assertion, this is the exact interpretation of the limitation on the doctrine followed by this Court in *Montana v. United States*, 440 U.S., 147 (1979). As stated by the *Montana* Court, the relevant inquiry is "whether controlling facts or legal principle have changed significantly . . ." 440 U.S., at

155. The Court clearly adopted the holding of *Sunnen* regarding the application of the doctrine. *Id*, at 161. Just as clearly, the Court did *not* hold or even imply, as respondent suggests, that only a reversal or overruling of the controlling legal principles would preclude application of the doctrine.

Respondent argues that *Michelin* did not effect a change in the controlling legal principles under which *Hooven I* was decided. Respondent bases this argument upon the fact that *Michelin* concerned the applicability of a nondiscriminatory state ad valorem tax to imported inventory held for resale while *Hooven I* concerned the applicability of such a tax to imported raw materials held for intended use in manufacturing. Taxpayer's argument is simply unfounded. *Hooven I* did not depend on the fact that raw material inventory was involved as opposed to inventory held for resale. The basis of *Hooven I* was that the tax challenged was attempted to be imposed upon imported inventory held in its original package.

Hooven I expressly recognized that whether the imported goods were held for resale or for use in manufacture was not relevant to a determination of its immunity from taxation under the Import-Export Clause:

> We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale. 324 U.S., at 667.

Following the century-old "original package" test applied to imported goods held for sale in *Low v. Austin*, 13 Wall. 29 (1872), *Hooven I* held that the same test prohibited the imposition of a nondiscriminatory state ad valorem

property tax on imported raw materials held for use in manufacturing.[1]

Michelin repudiated the "original package" doctrine upon which *Hooven I* was based, thereby effecting a change in the controlling legal principle of that decision and rendering the rule of collateral estoppel based on *Hooven I* inapplicable. Under the "original package" doctrine, the Import-Export Clause was viewed as a broad prohibition against all taxes on imported goods, including nondiscriminatory state ad valorem property taxes. *Michelin* held that the prohibition was only against the imposition of "imposts" and "duties" and that a nondiscriminatory state ad valorem property tax was neither an "impost" nor a "duty" and was therefore not prohibited by the Import-Export Clause.

While it is true, as respondent states, that *Michelin* did not hold that all forms of nondiscriminatory state personal property taxation are permitted, it did hold that all such taxes applied to imported goods no longer in transit are permitted under the Import-Export Clause. Respondent's reliance on *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) as limiting the holding in *Michelin* is misplaced. *Japan Line, Ltd*, was not an Import-Export Clause case; it struck down the imposition of California's nondiscriminatory ad valorem property tax on Commerce Clause grounds. Furthermore, the personal property involved in *Japan Line, Ltd.*, were foreign-owned and domiciled instrumentalities of foreign commerce (cargo containers) which were only temporarily located in various

[1] The Tax Commissioner's argument that *Hooven I* was based upon the "original package" doctrine formalized in *Low v. Austin* is fully set forth in the Brief for the Petitioner, at 16-20. J. Hellerstein, *STATE TAXATION*, ¶ 5.2[1] at 179 (1983), further supports this argument.

California ports and were used exclusively in international commerce. By their very nature, the cargo containers were still in transit. This Court noted the narrow scope of the question before it in *Japan Line, Ltd.*, 441 U.S. at 444; *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933, 2952 n. 24 (1983).

Respondent's statement that *Hooven I* and *Michelin* reached different conclusions based on the divergent impact of the taxes (Brief for Respondent, at 14) is spurious. The result of *Michelin* differed from that in *Hooven I* because *Michelin* repudiated the legal principle upon which *Hooven I* was based and applied a fundamentally different legal analysis which focused on the nature of the tax rather than on whether the goods upon which the tax was levied had lost their status as imports. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752 and 758-760; P. Hartman, *Federal Limitations on State and Local Taxation* § 5:4 at 198-199 (1981); J.. Hellerstein, *State Taxation* ¶ 5.4 at 176-177 (1983); W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich. L. Rev. 1426 (1977).

Because *Michelin* clearly repudiated the legal principle upon which *Hooven I* was decided, the Ohio Supreme Court erroneously applied the doctrine of collateral estoppel and failed to follow this Court's decision in *Sunnen*.

II. THE IMPOSITION OF OHIO'S NONDISCRIMINATORY AD VALOREM PROPERTY TAX ON IMPORTED GOODS NO LONGER IN TRANSIT AND HELD IN THAT STATE FOR USE IN MANUFACTURE IS NOT PROHIBITED BY THE IMPORT–EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION.

Respondent begins its argument by correctly noting that the only issue properly before this Court is whether the Ohio Supreme Court correctly held that this Court's decision in *Michelin* did not preclude the application of collateral estoppel based upon *Hooven I* to the assessment at issue.[2] The only facts necessary to determine this issue are that the taxes at issue in both *Hooven I* and *Michelin* are of the exact type as that at issue in the present case - a nondiscriminatory state ad valorem property tax - and that the imported goods against which the assessment at issue was attempted were no longer in transit.

While it may be necessary to consider the Import-Export Clause in determining the collateral estoppel issue, the Commerce Clause has no relevance to the collateral estoppel issue. Neither *Hooven I* nor *Michelin* even remotely involved the Commerce Clause. Similarly, in its decision below, the Ohio Supreme Court placed no re-

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[2] Repondent's assertion that the collateral estoppel issue is a state law question is unfounded. The decision upon which collateral estoppel was applied by the Ohio Supreme Court was not a state court decision, but a decision of this Court, *Hooven I*, dealing solely with a federal constitutional issue, the Import-Export Clause. The decision upon which the Tax Commissioner relied was also a decision of this Court, *Michelin*, which also dealt solely with the Import-Export Clause.

liance whatsoever on the Commerce Clause. That court specifically refrained fron deciding the Commerce Clause issue raised by respondent.

Although respondent had filed an appeal to the Ohio Supreme Court from the Ohio Board of Tax Appeals claiming that the Board had failed to determine the constitutional issues it had raised at the Board, it did not file a cross-petition with this Court from the Ohio Supreme Court's failure to determine those issues. It now seeks to raise those issues in its brief.

The Tax Commissioner submits that those constitutional issues, particularly the Commerce Clause issue, are not properly before this Court and urges the Court to so hold.[3]

The fact that these issues were not decided below and that respondent did not cross-petition this Court to consider them answers to respondent's suggestion that the Tax Commissioner was remiss in not addressing those issues. Furthermore, respondent's statement that the Tax Commissioner has completely ignored the policies underlying the Import-Export Clause enunciated in *Michelin* is untrue. The Tax Commissioner specifically addressed these policies in her discussion of the holding in *Michelin*. Brief for the Petitioner, at 15-16.

With respect to the Commerce Clause issue the Tax Commissioner agrees with respondent's statement that the record is barren of facts (Brief for Respondent, at 16), with the exception of the following: the imported goods assessed were no longer in transit; the imported goods were raw

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[3] The Tax Commissioner would note to the Court that the only Commerce Clause or Import-Export Clause issue raised by the respondent in its appeal to the Board of Tax Appeals was that imposition of the tax would impair the federal government's regulation of foreign trade. Pet. App. A-17.

materials intended for use in manufacturing; and the tax at issue is a nondiscriminatory state ad valorem property tax which is imposed on all property used in business in Ohio. However, the Tax Commissioner strongly contests respondent's suggestion that the absence of evidence is due to the Tax Commissioner's failure.

Any lack of evidence is due solely to the failure of respondent to present such evidence before the Ohio Board of Tax Appeals. Respondent was the party contending that its property was constitutionally immune from the tax and therefore had the burden of establishing its immunity. *Norton Co. v. Department of Rev.*, 340 U.S. 534, 537 (1951); *Central R. Co. of Pa. v. Pennsylvania*, 370 U.S. 607, 613 (1961); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 463 (1959); *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 750-751 (1978), Apparently relying on its collateral estoppel attack, respondent failed to make a factual record before the Board of Tax Appeals on which to base its constitutional claims on appeal. In fact, respondent waived its right to evidentiary hearing before the Board. Pet. App. A-19.

Because any lack of factual support for respondent's contention that its property is immune from the tax at issue under the Commerce Clause or as violating three policies of the Import-Export Clause, as enunciated in *Michelin*, is due to respondent's failure to present any such evidence, its argument that this Court should not decide this case because of the absence of such facts is disingenious.

Assuming, *arguendo*, that this Court determines that the constitutional issues raised by respondent, in addition to the constitutional issue inherent in the collateral estoppel issue, are properly before it, the Tax Commissioner will address those issues.

Respondent argues that the imposition of Ohio's nondiscriminatory ad valorem property tax on its imported raw material inventory would violate the Import-Export Clause and the Commerce Clause of the United States Constitution in three ways. The first violation alleged is that imposition of such tax would subject respondent to international multiple taxation. In support of this argument, respondent relies on *Japan Lines, Ltd v. County of Los Angeles*, 441 U.S. 434 (1979). The other two grounds on which respondent relies are identical to the three concerns which the Framers of the Constitution sought to alleviate by the inclusion of the Import-Export Clause in the United States Constitution. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285-286 (1976).[4]

A. Imposition of Ohio's Nondiscriminatory Ad Valorem Property Tax Would Not Result In International Multiple Taxation.

Respondent's argument ignores a crucial fact which is fatal to its argument. The property at issue herein has clearly come to rest in Ohio. The tax was assessed only on the imported raw material inventory stored by respondent in a warehouse in its Xenia, Ohio plant. Pet. App. A-2, A-12. This property remains in the warehouse until it is used by respondent in the manufacture of cordage.

This Court reaffirmed a basic limitation on the scope of the immunity provided by the Commerce Clause in

[4] Respondent's second ground apparently combines the first and second concerns noted in *Michelin*. The only argument advanced by respondent regarding the reduction of tariff revenues is in a footnote to its argument that imposition of the tax would conflict with federal regulation of foreign commerce. Brief for Respondent, at 35 n. 19. Respondent's third ground does have some Commerce Clause overlap.

Minnesota v. Blasius, 290 U.S. 1, 8 (1933):

> But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of of a conflict with the exercise of that power, a State may not lay a nondiscriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and acquired a situs within the State.

The Court noted that "[t]he 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transport' ". *Id.*, at 9. Thus, over Commerce Clause objections, the Court held as follows with respect to property no longer in transit:

> Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general massof property within the State and is thus subject to its taxing power. *Id.*, at 10.

Accord, Sonneborn Bros. v. Keeling, 262 U.S. 506, 508-509 (1923); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937); *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340, 348 (1944) The instant case fits squarely within the above holdings.

Furthermore, even assuming, *arguendo*, that the tax was subject to the Commerce Clause strictures, respondent's reliance on *Japan Line Ltd.* reveals a basic misconception of the holding in that case. This Court specifically recognized that the issue before it in *Japan Line Ltd.* was a

"narrow one, that is, whether instrumentalities of commerce that are owned, based and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State.[7] " 441 U.S., at 444 (footnote omitted).

This Court recognized that the two additional considerations it applied in *Japan Line Ltd.* - the enhanced risk of multiple taxation and the possibility that a state tax will impair federal uniformity in an essential area - come into play only "when a state seeks to tax the instrumentalities of foreign commerce." *Id.*, at 446. The Court recognized that these considerations would not be applicable where "No foreign business or vessel is taxed." *Id.*, at 449, n. 14, quoting from *Washington Revenue Dept.*, 435 U.S., at 754.

In *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983), this Court reemphasized the narrowness of its holding in *Japan Line Ltd.* and distinguished that decision on a ground that is equally applicable in the instant case:

> The third difference between this case and *Japan Line* is that the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States. 103 S. Ct., at 2952.

The risk of multiple taxation was inherent in *Japan Line Ltd.* because a foreign-owned and domiciled instrumentality of commerce was involved. The Court explained the reason for the inherent risk:

> If an instrumentality of commerce is domiciled abroad, the country of domicile may have the right, consistent with the custom of nations, to

> impose a tax on its full value. If a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results. 441 U.S., at 447.

Such a risk is not inherent or even possible in the instant case. The property against which the tax was assessed was imported raw material inventory which was no longer in transit and had come to rest permanently in Ohio. The only taxable situs of the property was Ohio. Because no other state or country has the right or authority to impose the same or a similar tax upon the property, no risk of multiple taxation exists. *Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 208-209 (1935); *Curry v. McCanlass*, 307 U.S. 357, 364 (1939).

In *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 260 (1938), this Court recognized that a multiple burden cannot occur when "[T]he tax is not one which in form or substance can be repeated by other states . . ." *Accord, Washinton Revenue Dept., supra*, at 746-747; *International Harvester Co. v. Evatt*, 329 U.S. 416, 423 (1947).

Assuming, *arguendo*, that some of the exporting countries imposed levies on the exporting of property upon which Ohio sought to impose its nondiscriminatory ad valorem tax after it had come to rest in Ohio, such fact would not result in multiple taxation. Multiple taxation occurs only when more than one state or country levies the same or similar tax on the same segment of the interstate transaction. As held by this Court in *Central R. Co. of Pa. v. Pennsylvania*, 370 U.S. 607, 612 (1962):

> It is only "multiple taxation of interstate operations," *Standard Oil Co. v. Peck*, 342 US 382, 385, 96 L ed 427, 430, 72 S. Ct. 309, 26 ALR2d 1371, that offends the Commerce Clause. And

> obviously multiple taxation is possible only if there exists some jurisdiction, in addition to the domicile of the taxpayer, which may constitutionally impose an ad valorem tax.

Accord, Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 228, n. 12 (1980).

An export levy on the privilege of exporting goods out of a country is vastly different from a nondiscriminatory personal property tax imposed upon all property held for use in business within a state after it has come to rest in that state. The very basis of the *Michelin* decision was that a state nondiscriminatory ad valorem property tax was clearly not like a duty on imports or exports:

> Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; . . . . 423 U.S., at 287.

Respondent's reliance on *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) to support its assertion that Ohio's ad valorem tax is the practical equivalent of an export levy is misplaced. In fact, *Henneford* directly rejects such a contention. In that decision, this Court explicitly held that a tariff and a tax on property after importation had ended are two different and distinct types of exactions. 300 U.S., at 586.

It was respondent's burden to demonstrate that imposition of Ohio's nondiscriminatory ad valorem property tax will result in multiple taxation. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 463 (1959); *Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S. 560, 563 (1975); *Washington Revenue Depart-*

ment v. Association of Washington Stevedoring Cos., 435 U.S. 734, 750-751 (1978). Respondent has failed to meet that burden. Respondent has failed to present any specific evidence that its imported goods were subjected to the same or similar taxes by any other taxing jurisdiction.[5] Such a demonstration could not be made with respect to the tax at issue because the property was permanently sitused in Ohio and no other state or country had the authority to impose an ad valorem tax on the goods.

B. Imposition of Ohio's Nondiscriminatory Ad Valorem Property Tax Would Not Conflict With Federal Regulation of Foreign Commerce.

This Court's decision in *Michelin* is controlling on this question.[6] This Court specifically held that nondiscriminatory property taxation can have no effect whatsoever on federal regulation of foreign commerce because such a tax

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[5] The affidavit of John P. Buck fails to support respondent's multiple taxation assertion. Furthermore, it is not a part of the record before this Court. The affidavit was not presented into evidence at any stage of the proceedings below - it was simply appended to respondent's brief filed with the Ohio Supreme Court. Respondent's reliance on Rule VIII, Section 7 of the Rules of Practice of the Ohio Supreme Court ignores the fact that Rule VIII applies only to original actions and that it sets forth a procedure for the presentation of evidence. This case was before that Court on appeal, not as an original action. Additionally, the record will reveal no motion or pleading by the respondent seeking the introduction of any additional evidence before that Court.

[6] In *Japan Line Ltd.*, this Court noted that the inquiry regarding the effect of a state tax on the federal government's regulation of foreign commerce is the same whether the Import-Export Clause or the Foreign Commerce Clause is involved. 441 U.S., at 449 n.14.

does not fall on imports by reason of their origin. This Court noted that such a tax could not be used to create special tariffs or to favor certain domestic goods or to encourage or discourage importation of goods. 423 U.S., at 286. *Accord, Washington Revenue Dept. v. Association of Washington Stevedoring Cos., supra,* at 753-754. The reason that the tax cannot be used in such a manner is that it applies to all property used in business in the state, regardless of origin.

Respondent's argument ignores the fact that the tax at issue is imposed on the domestic manufacturer, not on the foreign supplier.[7] The price charged by the exporter will not be affected by the tax because the exporter does not pay the tax nor is it passed on to him by the buyer. The tax is imposed on all imported goods and domestic goods regardless of the source. Therefore, it cannot even conceivably confer an advantage upon certain foreign or domestic suppliers.

Because the tax is imposed on all property used in business in Ohio regardless of its source, it cannot have any effect on where a manufacturer chooses to obtain its goods. This demonstrates the utter lack of foundation for respondent's argument that imposition of the tax could nullify the effect of federal trade and tax concessions and tariff preferences.

Respondent's reliance on the Model Conventions[8] as an indication of the need for federal uniformity is misplaced.

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[7] This Court found this factor to weigh against the possibility of any retaliation by foreign trading partners. *Container Corp. of America v. Franchise Tax Board,* 103 S. Ct. 2933, 2955-2956 (1983).

[8] OECD Model Convention For The Avoidance of Double Taxation With Respect To Taxes On Income And Capital, Chapter II, Article 2, *reprinted in* 1 Tax Treaties (CCH),

Initially, the conventions are model ones, not ones entered into by the United States. Second, even if the Model Conventions indicated a federal policy, a review of each of the Model Conventions reveals that property is taxed in the state wherein the property is sitused. Chapter IV, Art. 22 of each Model Convention, I Tax Treaties (CCH), ¶ 151, at 215, ¶ 171, at 291. This is wholly consistent with Ohio's taxation of property held for business use within its borders.

This Court made it clear in *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933, 2955 (1983) that absent an explicit directive from Congress it would not infer that impositon of a tax would violate the "one-voice" standard unless the Court could determine that the tax would directly implicate foreign policy issues which must be left to the federal government. The three factors relied on by this Court in *Container Corp.* in determining whether retaliation was likely to result if the tax at issue therein was imposed, 103 S. Ct., at 2955, 2956, weigh even more heavily against such a possibility in the instant case.

Respondent has failed to demonstrate how the tax would implicate foreign policy or to cite a single federal directive prohibiting imposition of the tax. It is suggestive of the lack of any federal foreign policy implications that the Executive Branch has chosen not to file an *amicus curiae* brief in opposition to the tax. *Id.*, at 2956. Certainly, if the federal government believed that its regulation of foreign commerce was threatened by the imposition of state ad valorem taxes on imported goods no longer in

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¶ 151, at 208 (1980); United Nations Model Double Taxation Convention Between Developed and Developing Countries, Chapter I, Article 2, *reprinted in* 1 Tax Treaties (CCH), ¶ 171, at 282 (1980).

transit, it would have taken some form of action to remove that threat in the now more than seven years since this Court's decision in *Michelin.*

In a footnote, respondent argues that imposition of the tax would violate the second concern of the Import-Export Clause recognized in *Michelin,* the federal government's exclusive right to all revenues from imposts and duties. Brief for Respondent, at 35 n. 19. This argument is directly refuted by this Court's decision in *Michelin.* This Court held that because a nondiscriminatory ad valorem property tax is not an impost or duty on imports, the federal government is deprived of nothing to which it is entitled. 423 U.S., at 286-287. Respondent's argument that imposition of the tax on its imported goods would indirectly reduce federal tariff revenues was specifically addressed in *Michelin*:

> It may be that such taxation could diminish federal impost revenues to the extent its economic burden may discourage purchase or importation of foreign goods. The prevention or avoidance of this incidental effect was not, however, even remotely an objective of the Framers in enacting the prohibition. *Id.,* at 287.

C. Imposition of Ohio's Nondiscriminatory Ad Valorem Property Tax Would Not Create Interstate Commercial Conflict.

Respondent's argument reveals a basic misconception of the free flow of trade among the states aspects of the Commerce Clause and the Import-Export Clause. As *Michelin* noted, the Import-Export Clause was intended to prohibit the seaboard states from imposing exactions which were no more than transit fees on property passing through those states. 423 U.S., at 285, 288-290. The Court held that a nondiscriminatory ad valorem property tax stood

on a different footing and did not therefore violate the Import-Export Clause, at least as imposed upon imported goods no longer in transit. *Id.*, at 288-290.

The Commerce Clause prohibits a state from imposing a taxing scheme which discriminates against interstate commerce by providing a direct commercial advantage to local business. *Boston Stock Exchange v. State Tax Com.*, 429 U.S. 318, 329 (1977). Clearly, Ohio's personal property tax provides no such advantage. It does not apply only to goods held for use in business in Ohio which were acquired from another state or country. It is imposed upon all goods regardless of their source and is therefore non-discriminatory.

Respondent argues that imposition of the tax will cause interstate conflict because a manufacturer's decision on where to locate will be affected by whether a state imposes a property tax on raw materials and that states may use this fact to lure manufacturers by structuring their tax laws to alleviate this burden. This argument is directly refuted by this Court's decision in *Boston Stock Exchange*:

> Our decision today does not prevent the states from structuring their tax systems to encourage the growth and development of interstate commerce and industry. Nor do we hold that a State may not compete with other states for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition, no State may *discriminatorily* tax a product manufactured or the business operations performed in any other State. (emphasis added). 429 U.S., at 336-337.

Because Ohio's personal property tax is imposed upon all property held for use in business whether it was acquired in Ohio or elsewhere, it is not discriminatory and cannot affect the free flow of trade.

CONCLUSION

For the reasons set forth in the foregoing brief, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the required number of copies of the foregoing Reply Brief have been served on the respondent by forwarding such copies to Michael A. Nims, Kenneth E. Updegraft, Jr., and Charles H. Mollenberg, Jr., Jones, Day, Reavis & Pogue, 1700 Union Commerce Building Cleveland, Ohio 44115, counsel for respondent, by United States mail, postpaid, this _____ day of February, 1984. I further certify that all parties required to be served have been served.

RICHARD C. FARRIN
Assistant Attorney General